

Major policy changes under new IBC Act, 2016

SEYCHELLES

The list of main policy changes (amongst other changes) under the new IBC Act are as follows:

1. In line with global norms, the Registrar under the new Act shall be the Chief Executive Officer (CEO) of the Financial Services Authority (FSA) rather than the FSA itself.
2. Extension of the list of prohibited IBC activities

From a risk and reputational perspective, extend the list of prohibited activities that an IBC cannot undertake include:

- carrying on securities business as defined under the Securities Act (in or outside Seychelles) unless such activities are licensed or otherwise legally able to do so under the laws of each country outside Seychelles in which the IBC carries on such business,
- carrying on business as a mutual fund (as defined in the Mutual Fund and Hedge Fund Act) unless it is licensed to do so under the Mutual Fund and Hedge Fund Act or under the laws of a recognized jurisdiction (as defined in the Mutual Fund and Hedge Fund Act),
- carrying on gambling business (as defined in the Seychelles Gambling Act), including interactive gambling business (in or outside Seychelles), unless such activities are licensed or otherwise legally able to do so under the laws of each country outside Seychelles in which the IBC carries on such business.

3. Provisions to allow IBCs to be Protected Cell Companies (PCCs)

Provisions have been included to allow IBCs to be Protected Cell Companies (PCCs). This will aim at building value-added business. PCCs are primarily used for mutual fund structures (i.e. to operate as a mutual fund, an IBC PCC would need to be licensed under the Mutual Fund and Hedge Funds Act). PCCs are also commonly used for offshore captive insurance business (i.e. where the insured and the insurer are affiliated parties).

4. Introduction of an “internal” register of beneficial owners (BO Register)

Subject to an exemption for listed companies and subsidiaries of listed companies, the BO Register will be required to be kept by an IBC at its registered office in Seychelles, alongside the internal register of directors and register of members which must be kept by the IBC. The adoption of the internal BO Register is desirable for product longevity and provides an effective balance between strengthening regulation (to meet OECD and FATF standards relating to time access to BO information) and preserving IBC market attractiveness.

5. Requirement to keep its register of directors only at its registered office

In order to improve the availability of directorship information in Seychelles (to meet OECD and FATF standards), an IBC will be required to keep its register of directors only at its registered office. The current law provides that the register may also be kept at such other place in Seychelles as the directors determine.

6. Filing of a copy of Register of Directors with the Registrar

In order to meet FATF Standards, all IBCs will be required to file with the Registrar a copy of its register of directors, which will be made publicly available.

Every IBC shall have a period of 12 months from the Act commencement date to file a copy of its register of directors with Registrar.

The register of directors that has been filed with the Registrar will only be made publicly accessible after two years following the Act commencement date, except that as from the Act commencement date SRC, FIU, etc. shall have the right (without charge) to inspect the filed register of directors.

7. No requirement to specify the objects of the company in the Memorandum.

A company will not be required to state the object of the company in its Memorandum of Association. In such cases, the company's object is deemed under the Act to include any activity that is not prohibited under any law for the time being in force in Seychelles. In cases where the objects are specified, the company is limited to carrying on those objects. This is in line with modern company laws in other jurisdictions including the UK, Singapore, Hong Kong, BVI and Mauritius.

8. Requirement to state, in the Memorandum, the activities which the Act prohibits an IBC from undertaking.

Such provision makes it clear to all third parties dealing with an IBC that, whilst an IBC can undertake any legal activities, the law restricts them from undertaking certain types of activities and the third party can enquire accordingly.

9. To provide clearly that a company is prohibited from issuing bearer shares (to meet OECD and FATF standards).

This provision is necessary to clearly ban bearer shares and to remove interpretation issues by international organizations when reviewing Seychelles' laws (especially the OECD).

10. More comprehensive provisions has been introduced relating to shares, including (among others) detailed provisions relating to: (i) issue of shares, (ii) no par value shares, (iii) optional preemptive rights, (iv) transfer of shares, (v) distributions, (vi) redemptions and company purchase of own shares, and (vii) forfeiture of shares.

11. New provisions has been introduced to discourage aged shelf companies which are damaging to the reputation of Seychelles and also to improve our standing with the OECD and FATF.

The new Act provides that the first director(s) must be appointed within 9 months of the date of the company's incorporation.

12. Introduction of the concept of "conversion" of companies.

Currently, when (i) a foreign company continues in Seychelles or (ii) a Seychelles company continues from a Companies (Special Licence) ("CSL") to an IBC (or vice versa), the law treats these as "continuation". However, looking at the global norm,

“continuation” generally refers to the former (i.e. companies moving jurisdictions) rather than the latter (i.e. moving legal status within the jurisdiction). Therefore, where a Seychelles company changes its legal status under the new Act (i.e. from IBC to CSL or vice versa) within the jurisdiction that this is treated as “conversion”.

13. Provisions to allow the Registrar to permit the reuse of company names.

Because of the large number of companies that have now been incorporated, there is some constraint on being able to choose a company name that has not been used before or is not similar to a name already used. Examples where a company will be able to reuse a company name include once that company has been dissolved, continues outside of Seychelles to another jurisdiction and where a company changes its name, its original name will be available.

14. Revision of the striking off process.

In accord with global norms, the time it takes to strike off a defaulting company has been reduced from 180 days to 90 days. This will also improve our standing with the OECD and FATF in terms of the effectiveness and efficiency of the enforcement provisions.

15. Provisions to enable an application to the Court for an order for the restoration of dissolved companies within 5 years of dissolution.

Such provisions are in line with modern corporate laws (including in the UK, Ireland, BVI, Anguilla, Mauritius, Singapore, etc.). Seychelles’ domestic Companies Ordinance already provides for such restoration. The main reason it is occasionally invoked is where a company is dissolved at a time when it still owned assets (e.g. real estate) and the company must be in existence to enable a legal transfer of that asset to occur. Another reason for post-dissolution restoration may be because a third party (e.g. a creditor) has a legal claim against the dissolved company which cannot be resolved without commencing court proceedings against it (i.e. a dissolved company does not “exist”, so needs to be restored for such purposes).

16. New provisions will allow a registered agent to change the registered office of companies under its administration when there is a change of the registered agent’s principal place of business in Seychelles.

This will be done through the filing of a notice to the Registrar by the registered agent. Upon registration of the notice, the company’s memorandum will be deemed to be amended to state its new registered office (i.e. the registered agent’s new principal place of business in Seychelles). The streamline process avoids cost for the company when it did not request the change of registered office.

17. Provisions have been introduced to allow optional registration of the company’s register of members and beneficial owners with the Registrar – as is sometimes requested by banks who are lending to IBCs.

This will improve transparency in information readily available on members and owners of IBCs which will in turn improve our standing with the OECD and FATF.

18. Provisions to allow for the optional filing of annual financial statements with the Registrar.

Whilst not mandatory, this will improve transparency in information readily available on financial standing of IBCs which will in turn improve our standing with the OECD and FATF.

19. New power of Registrar to require a company to change its name if the name does not comply with the requirements of the law, in line with global norms.

Such powers for the Registrar are the norm in other jurisdictions, including in the UK, Jersey, Mauritius, Guernsey, Anguilla, Singapore, etc. Such provision will be used only in exceptional circumstances, especially where the name is misleading the public and may cause reputational damage to the Seychelles' reputation.

20. Provisions have been introduced to allow a company to include in its Memorandum and Articles provisions for the payment of commissions.

Such a provision is common under modern corporate law (Bermuda, Jersey and Guernsey). A company is a separate legal person and who it pays commissions to is a commercial and contractual decision for it (i.e. if the shareholders decide to include a provision in the company's Memorandum and Articles allowing for the payment of commissions).

21. More comprehensive provisions for Limited life (or limited duration) companies.

Limited life companies are permitted in many jurisdictions, including reputable centres such as Bermuda, Jersey, Guernsey and Mauritius. A company is a limited life company if its memorandum includes a provision that the company shall be wound up and dissolved upon (a) the expiration of a fixed period of time (b) the bankruptcy, death, expulsion, insanity, resignation or retirement of any member of the company or (c) the happening of some other event which is not the expiration of a fixed period of time.

22. Provisions for reserve directors.

Where a company has only one member who is an individual and that member is also the sole director of the company, that individual may nominate a person as a reserve director to act in the place of the sole director in the event of his death.

23. The new Act provides for tighter provisions in relation to continuation of companies in or outside of Seychelles, including, to provide that a foreign company whose laws under which it is incorporated does not permit its continuation in Seychelles will not be permitted to continue in Seychelles (contrary to what is provided for under the current law).

24. The new Act removes the current 90-day limit on ratification of pre-incorporation contracts in order to bring Seychelles' position in line with modern corporate law elsewhere.

The norm is that there is no time-limit. Pre-incorporation contracts happen when a person enters into a contract in the name of a company before the company is incorporated. Generally that person will be personally liable under contract unless the company ratifies the contract after its incorporation.

25. The new Act provides for procedures in cases where the international corporate service providers licence of a Registered Agent is revoked.

These provisions require the revoked licensee to notify the IBCs under its administration that it has ceased to be eligible to act as their registered agent and these IBCs will be required to appoint new registered agents, failing which they will be in noncompliance with the law.

26. The new Act requires a company to keep a register of charges at its registered office and provides for optional registration of charges by the Registrar.

The current law is not seen as strong by lenders because, while charge registration is possible, registration is disregarded for the purpose of determining priorities among secured creditors over the same asset (therefore, generally speaking, priority among chargees having security over the same IBC assets will be determined based on a date of charge creation basis). Consequently, most lenders do not bother with IBC charge registration in Seychelles. Under the new Act, while registration will still be optional, registration will determine priorities among secured creditors. Therefore, in view of the adverse impact on priority resulting from non-registration of a charge, most, if not all, lenders will presumably insist on registration of charges created by an IBC on or after commencement of the new Act. Pre-existing charges (i.e. created before the Act commencement date by an IBC incorporated under the IBC Act 1994) on property of a company shall rank among themselves in the order in which they were created.

27. Disqualification orders of director.

These new provisions will enable the Court to make an order, for example, prohibiting a person from being a director, secretary or other officer of any IBC where the director may have been involved in fraud, dishonesty, misconduct or other wrongdoing in connection with a company.

28. New provisions in respect of fraudulent or wrongful trading

If any business of a company is carried on with intent to defraud creditors (whether of the company or of any other person), or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner is guilty of an offence. Provisions will also apply for civil liability in insolvent trading situations.

29. Provisions relating to the winding up and dissolution of IBCs have been strengthened, including adding detailed provisions for the voluntary winding up of insolvent companies and for compulsory winding up by the Court.

30. Accuracy of Registers

For visibility and clarity (and noting FATF Standards), new provisions have been included requiring that an IBC ensure that the information required to be kept in its registers (i.e. Register of Members, Register of Directors and Register of Beneficial Owners) is accurate and up-to-date.

31. Location of Register of Members for listed companies

A listed company will be allowed to seek permission of the Registrar to keep its Register of Members at a place in Seychelles other than at its registered office (i.e. it cannot keep its Register of Members outside Seychelles, though a copy could be kept outside Seychelles).

32. Furnishing of Records

The section providing for “Furnishing of Records” will clarify that where an IBC is requested pursuant to a written law of Seychelles to furnish all or any of its records, including a request by the SRC, FIU or FSA, the IBC shall cause the requested records to be furnished to the requesting party in Seychelles within the time period specified in the request.

The section defines “records”, in relation to an IBC, to include its accounting records, minutes and resolutions of members and directors, annual returns, register of members, register of directors, register of beneficial owners and register of charges (if any).

33. Proportionate and Dissuasive Sanctions (FATF Standards)

- (a) The “catch-all” fine limit (i.e. for offences where penalty is not provided elsewhere) has been increased from \$5,000 to \$50,000 (section 368);
- (b) The fine for making false statements to the Registrar has been increased from US\$25,000 to US\$50,000 (section 370);
- (c) The penalty fee for failure to keep accurate Register of Members has been increased from \$100 and \$25 per day thereafter to \$500 and \$50 per day thereafter (section 104);
- (d) The penalty fee for failure to keep accurate Register of Beneficial Owners has been increased from \$100 and \$25 per day thereafter to \$500 and \$50 per day thereafter (section 356);
- (e) The fines for failure to identify and disclose beneficial owners has been increased from \$10,000 to \$50,000 (sections 359(6), 360(7) and 360 (8)).

A new provision has also been included under section 354 to require the Registrar, before imposing any penalty fees under the Act, to give the person concerned an opportunity of being heard.

34. Permitted IBC Name Suffixes

In accordance with World Bank (STAR Report) recommendations, the permitted IBC name suffixes denoting limited liability has been reduced. The new IBC Act will permit only the following suffixes: “Limited”, “Corporation” or “Incorporated” or the abbreviations “Ltd”, “Corp”, “Inc” (or PCC for protected cell companies). The new name requirements will only apply to companies incorporated or continued under the new Act and will not apply to existing IBCs incorporated or continued under the IBC Act 1994.

35. IBCs owning or managing vessels registered in Seychelles

The new Act clarifies that an IBC may own or manage a vessel registered in Seychelles under the Merchant Shipping Act and the vessel may visit or be situated in Seychelles waters, provided that the IBC shall not carry on any business in Seychelles in contravention of section 5(2)(a), including, without limitation, fishing, charter or tourism business involving the vessel.

36. Leasing of Seychelles' property by IBCs

Under the new law, IBCs will no longer be permitted to hold a lease of property for use as an office from which to communicate with members or where books and records of the company are prepared or maintained. That provision is not consistent with the general principle that IBCs shall not carry on business in Seychelles and has been abused on all occasions. As an IBC is intended for business use outside Seychelles, it is sufficient for its local presence to solely be through its registered office provided by its Seychelles CSP (Registered Agent).

37. IBCs holding Seychelles' government bonds, treasury bills, etc.

Under the new law, IBCs will no longer be able to hold bonds, treasury bills and other securities issued by the Government of Seychelles or the Central Bank of Seychelles.

38. Search Fee

The IBC search fee has been reduced from \$100 to \$10. In accordance with FATF recommendations, World Bank (STAR Report) recommendations and position of the Tax Justice Network, basic company information (i.e. company name, company number, registered address, director information, etc.) must be available to the public. However, the current \$100 search fee applicable for company searches is seen as a deterrent and the Tax Justice network concludes that, because the fee is more than \$10, the data is not publicly available.

39. New provisions relating to Annual Returns

(a) A company will not be required to submit an annual return (i.e. an annual compliance declaration) in the year of its incorporation or continuation, or conversion into an IBC, under the Act.

(b) The content of the Annual Returns has been amended to provide declarations only in respect of records that are not required to be kept in Seychelles (i.e. accounting records, minutes and resolutions) and to include details of the address at which the company's accounting records and minutes and resolutions are kept.

(c) A company that fails to furnish its Annual Return will be liable to a fixed penalty fee of \$500 and if a company provides false or misleading return, it shall commit an offence and is liable on conviction to a fine not exceeding US\$5000.

40. A person aggrieved by a decision of the Registrar may, within 90 days of service of notice of the decision of the Registrar, appeal against the decision to the Appeals Board established under the Financial Services Authority (Appeals Board) Regulations, 2014.

Currently, any appeal against the decision of the Registrar must be made to Court. Given that the Court process may be a lengthy and costly process, it is proposed to have a more efficient and cost effective appeal process. Of course, any person not satisfied with the decision of the Appeals Board may bring the matter before the Court.